

Q. B. Rebuilders, Inc. and Machinists Automotive Trade District Lodge No. 190 of Northern California, Machinists and Mechanics Lodge No. 2182, Petitioner. Case 32-RC-3572

October 29, 1993

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The National Labor Relations Board has considered an objection to an election held July 31, 1992, and the hearing officer's report recommending disposition of it.¹

The Board has reviewed the record in light of the exceptions and brief, and has decided to affirm the hearing officer's findings and recommendations only to the extent consistent with this decision.

The sole issue in this case is whether the laboratory conditions required for a free and fair election were destroyed when, on the day before the election, the Immigration and Naturalization Service (INS) detained an employee at the Employer's facility in the presence of 20 onlooking employees and took the employee away, following widely disseminated third-party threats to call the INS with respect to any employee who failed to vote for the Union. Contrary to the hearing officer, we find that the events leading up to the election created an atmosphere of fear and reprisal such that the laboratory conditions could not have been maintained under the circumstances.

The Employer remanufactures brakes and calipers. At the time of the election, there were approximately 70 employees in the unit, 90 percent of whom were not United States citizens. Two weeks before the election, employee Jose Cortes, who was a designated member of the Union's in-plant organizing committee,² was overheard by employee Roberto Lopez telling a group of six or seven coworkers and Union Organizer Ernesto Medrano that he would call the INS to report any employee who voted against the Union. According to Lopez, Cortes and the rest of the group laughed as if Cortes were joking, and Lopez himself perceived the remark to be a joke, too.

During the course of the next 2 weeks Cortes repeated the aforementioned remark in the lunchroom, and it was widely disseminated among employees in the bargaining unit. The reaction of employees varied, with some taking the remark as a joke and others be-

coming upset by it. For example, Lopez became irritated and angry about the remark as it was repeated among unit employees and concluded that it had not been a joke. He informed Supervisor Joe Chavez about it. Lopez also confronted Cortes about the remark a week and a half prior to the election, and Cortes told him that the remark was a joke. Employee Rogelio Avina, who overheard Cortes repeat the remark in the lunchroom, informed Supervisor Noe Gonzalez about it, and employee Ninfa Aguilar also informed Gonzalez about "rumors" that the INS would be called if the Union lost the election.³

On July 25, the Union conducted a meeting which 12 to 25 employees attended. Lopez, Aguilar, and another employee raised the issue of Cortes' remarks regarding problems with the INS if employees did not vote in favor of the Union. At that time Cortes acknowledged making the remarks but reiterated that it had been a joke.⁴ On July 28, 3 days before the election, the Employer conducted meetings to discuss "the Union situation." At one meeting, which 15 to 30 employees attended, General Manager Johnson told employees that the Employer had heard rumors of "threats" and said such rumors would not be tolerated and that anyone making threats from that day forward would be disciplined. Employee Napoleon Gonzalez said that the threats were "just a bad joke."⁵ The threats were also raised at another meeting that day, and employee Hermilio Lopez also said they were a joke.

On July 30, the day before the election, as employees arrived for work between 5:30 and 6 a.m., INS agents stopped (Roberto) Lopez' vehicle in the parking lot and asked him and his passengers for documentation. One passenger, an employee who did not have his documents with him, was taken away by the agents.⁶ The undisputed evidence indicates the incident occurred in the presence of 20 employees.

The hearing officer properly set forth the standard to be applied in determining whether third-party conduct warrants setting aside an election. Thus, the objecting

³The hearing officer appropriately described testimony such as that cited above by employee Aguilar as being hearsay as to what had been said by Cortes, but relied on such testimony by Aguilar and other witnesses to establish dissemination among employees of Cortes' statements relating to the INS.

⁴Also at this meeting, an employee questioned Medrano concerning a rumor that the Union had a practice of seeking to replace undocumented employees with documented workers. Union Agent Medrano responded that he had participated in projects to help immigrants and that the Union's policy was not to discriminate on the basis of race, religion, or legal status.

⁵The evidence also indicates that Gonzalez had told an employee 2 weeks before the election that the INS would come for the employee if the Union didn't win.

⁶The employee who was escorted away by the INS agents ultimately returned to work, but the record does not reflect when he did so.

¹All dates are in 1992. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 40 ballots cast for and 22 cast ballots against the Petitioner, with 5 challenged ballots, an insufficient number to affect the election.

²The Employer does not except to the hearing officer's finding, supported by the record, that Cortes was not an agent of the Union at material times.

party must establish that the third-party conduct during the election campaign was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible. *Westwood Horizons Hotel*, 270 NLRB 802 (1984). Further, in determining the seriousness of a third-party threat, the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of [that person's] capability of carrying out the threat; and whether the threat was "rejuvenated" at or near the time of the election. *Id.* at 803.

Applying this standard, we find that Cortes' conduct in the 2 weeks prior to the election, in combination with the events of July 30, created an atmosphere of fear and reprisal that precluded the conduct of a free and fair election. To begin with, Cortes' remark, even if uttered in jest, constitutes a serious threat of harm economically and emotionally to the overwhelming majority of the bargaining unit, for it invokes the sanctions of detention and loss of work, and possible deportation.⁷ Here, there is evidence that the threat to call the INS on employees who did not vote in favor of the Union was admittedly repeated by Cortes to various unit employees and was disseminated to at least one-third of the bargaining unit. There is further evidence that whatever humor accompanied the initial remark was diluted in the course of its widespread dissemination. Moreover, any potential that the threat may have been mitigated during the week prior to the election when employees were told in various forums that Cortes' remark was a joke, was completely negated and the threat itself and the severity of its consequences were immediately brought to bear the day before the election when approximately one-third of the bargaining unit witnessed a coworker's actual detention and removal by the INS from the Employer's facility.⁸ In this connection, we find this case readily

distinguishable from *Mike Yurosek & Sons*, 225 NLRB 148 (1976), *enfd.* 597 F.2d 661 (9th Cir. 1979), on which the hearing officer relied, and which likewise involved third-party threats by a member of the in-plant organizing committee to call the INS if the Union lost, and mitigating disavowals by other organizing committee members. There, INS authorities had been to the plant several months prior to the conduct in issue. Thus, there was no rejuvenation of the threat once it was mitigated as there was in the instant matter. In our view it defies all logic and imagination to think that Cortes' recent remarks did not again come to the fore and permeate the voting atmosphere with fear of reprisals once the INS detained an employee in front of several witnesses on the day before employees voted. Whatever jocularly was intended by these earlier references to calling in the INS was completely obscured by the patent seriousness of the INS' actual detention and removal of the employee.

On the basis of the foregoing, we shall set aside the election and remand this proceeding to the Regional Director for the conduct of a second election. In reaching our decision to set aside the election in the instant matter, we note that it is precisely because third parties generally do not have the power to effectuate threats that affect a significant segment of the bargaining unit that the Board analyzes their conduct in terms of a prevailing atmosphere of fear in determining whether the conduct is objectionable. If it were not for such a test, the Board would be put in the posture of setting aside a great number of elections simply because a partisan employee makes overbearing or exuberant remarks to coworkers.⁹ Accordingly, we do not necessarily suggest by this decision that threats by a third party to call the INS or the appearance of INS agents at the situs of a Board election will separately result in an election being set aside. However, where such threats are proximately accompanied by an actual INS operation, and the workforce is overwhelmingly vulnerable to such events, we will not hesitate to find third-party misconduct if these events immediately precede the election, regardless of any further causal connection.

ORDER

It is ordered that this proceeding is remanded to the Regional Director for Region 32 for action consistent with this Order.

[Direction of Second Election omitted from publication.]

⁷ Member Raudabaugh notes that, as set forth herein, the statements, as recounted by some, were that the INS would be called if the Union lost the election. As recounted by others, the statements were that the INS would be called as to any employees who voted against the Union. As to the latter statement, in his view employees who are familiar with NLRB secret ballot processes would know that the Union could not ascertain how individual employees voted. However, in view of the fact that most of the employees involved herein are noncitizens, he is concerned that many of them may not be familiar with NLRB processes, and they would therefore fear that the Union could ascertain how individual employees voted.

⁸ It is immaterial that Cortes was not shown to have had any involvement in the INS visit to the Employer's premises, or that his earlier statements did not specifically threaten that he or the Union would initiate any INS activity. Regardless of whether the INS visit may have been initiated by another individual or may have been merely coincidental, it was Cortes who forecast the prospect of INS intervention in relation to the union organizing effort. The presence

of the INS at the Employer's premises on the day before the election, regardless of the reason, revived and reinforced the threats which Cortes was responsible for generating.

⁹ *Blue Island Newspaper Printing*, 273 NLRB 1709 (1985).